SUPREME COURT, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1974

JOSE JESUS PEREZ-LOPEZ)
& EUGENIO PEREZ-LOPEZ,)
)
Petitioners,) No. 73-191
)
vs.)
)
IMMIGRATION &)
NATURALIZATION SERVICE,)
)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jose Perez-Lopez and Eugenio Perez-Lopez, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on March 26, 1974, affirming the Board of Immigration Appeals decision in the above case decided on March 8, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit presented in the Appendix (A. 1-4) is unreported. No. 72-1667, 9th Cir., March 26, 1974.

The Board of Immigration Appeals decision presented in the Appendix (B. 1-7) is reported in Matter of Perez-Lopez, Int. Dec. No. 2132, 14 IN _____ (March 8, 1972).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit dated and entered its judgment in this case affirming the Board of Immigration Appeals' approval of the order of deportation issued to petitioners, on March 26, 1974. No extension of time has been sought or granted within which to petition for certiorari. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question

by writ of certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether in a deportation case where the immigration judge has ruled that evidence of deportability may not be admitted because it was the product of an illegal search and seizure, the government has produced sufficient evidence, and the type of evidence acceptable, to show that the original evidence is admissable at a reopened hearing as no longer being the product of the original illegal search and seizure but the product of an independent source, when the evidence relied upon by the government to show an independent source for the evidence excluded is an anonymous informant's letter received after the original evidence was held inadmissable.

STATEMENT OF THE CASE

Petitioners were stopped by immigration officers on a street corner in San Francisco,

California. They were arrested and their residence was searched. This search produced their Mexican passports and other documents. These allowed the Service to obtain records from its own files which showed petitioners' deportability.

At the deportation hearing the statements obtained from petitioners as well as the documentary evidence was introduced over objection that they were all the product of an illegal arrest and unlawful search and seizure. The petitioners were found deportable as aliens who were admitted as visitors and remained longer than their visas permitted.

On appeal, the Board of Immigration Appeals returned the case to the Immigration Judge with instructions that he should accept evidence offered by petitioners' counsel that the arrest and resultant search and seizure were unlawful.

At the reopened hearing the Immigration Judge found the evidence offered by the Service to be the product of the illegal stop and held it inadmissable. He said that although petitioners were illegally in the United States, the illegal action of the officers which produced the evidence of deportability precluded the use of that evidence, and therefore, they were not deportable. He concluded:

> As far as the Service is concerned, unless it can obtain evidence from independent sources upon which it can reinstitute proceedings, it will be unable to move further against the respondents . . . (Emphasis supplied)

That decision was made on March 8, 1971. On April 13, 1971, an anonymous letter was written to the Service informing it of the petitioners' whereabouts and stating that they were in the country illegally. At this point the petitioners had been in the country since 1968, and

it had been almost two years since they were originally stopped. Apparently during this period of time the Service had received no other information concerning the men.

On April 29, 1971, the Service moved to reopen the deportation hearing. The basis for this motion was that a letter had been received naming the men and their families as illegal aliens and that this letter had started an investigation that was independent of the illegally seized evidence. The Service sent two officers to interrogate the wife of one of the petitioners and also their mother. These women made statements that named the petitioners and identified them as Mexican citizens.

At the new hearing the women testified that they were frightened of the officers when they came. The officers asked to see what documents they had to show they were here legally. The women, who were here legally as visitors,

produced papers to show their status. Then the men stated they wanted to ask questions about Jose and Eugenio. The women protested that the petitioners had their attorney, but the officers said that this was something different and was to help them. The women then made the statements identifying petitioners.

One of the officers who had interrogated the women testified at the hearing. He was asked by counsel whether he was instructed to inquire into the legality of the women's stay in the country. He answered:

> Yes. And in addition there was one further thing there. I was informed that this was possibly members of the family of a case which we had previously, I think, which is the case you're dealing with now. And if it was to try and determine something about the nationality or the circumstances of the sons [petitioners] of the lady I was going to interview.

He stated later:

> As I recall I had been told --the supervisor told me about the status of the brothers [petitioners]. The primary question was the status of the family. The secondary question was, 'If you can, try and find something about the brothers.'

The Service then successfully moved to introduce the women's statements and the documentary evidence that had been introduced originally, arguing that they now had their source in the anonymous letter and not in the illegal stopping. The introduction of this evidence was allowed over objection, and the Immigration Judge ruled that the petitioners should be deported.

On appeal to the Board of Immigration Appeals, it was ruled that the order of deportation was proper. In passing on the question of whether the evidence was free from the prior illegality, the Board said:

> There is nothing in this record which would indicate that the anonymous letter was inspired by the Service. (Appendix B at 7)

A petition for review of this decision was filed with the United States Court of Appeals for the Ninth Circuit under the provisions dealing with direct review of Immigration decisons by the Court of Appeals, 8 U.S.C. §1105. The Court of Appeals upheld the Board of Immigration Appeals decision. (Appendix A)

REASONS COMPELLING THE ALLOWANCE OF THE WRIT

1. THIS CASE PRESENTS AN IMPORTANT ISSUE AS TO THE BURDEN OF PROOF AND THE TYPE OF EVIDENCE REQUIRED IN A CASE WHERE THE GOVERNMENT CLAIMS IT CAN INTRODUCE EVIDENCE ORIGINALLY ILLEGALLY ACQUIRED BUT LATER CLAIMED NOT TO BE A PRODUCT OF THE ILLEGALITY OR CLAIMED TO HAVE HAD THE TAINT REMOVED.

It is well settled that if evidence is originally obtained illegally, it must be excluded

and that any evidence resulting from the original evidence must also be excluded. Wong Sun v. United States, 371 U.S. 471. In Wong Sun, this Court set forth the test as to whether the resulting evidence is the "fruit of the poisoned tree" and so excludeable:

> [W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinquishable to be purged of the primary taint. 371 U.S. 488

While this makes it clear what evidence is to be exluded, it does not give clear guidelines as to how the burden of proof is to be allocated between prosecution and defense on the issue of whether the evidence later sought to be admitted is "tainted" or clean. Also, it does not deal with the type of evidence that may be introduced to show that evidence is free from taint.

Decisions of this Court have given some

guidelines but have not settled the issue, as this case illustrates.

In Nardone v. United States, 308 U.S. 338, evidence was acquired by an illegal wiretap. The Court ruled that the defendant had the right to inquire into the use made of this evidence to see if subsequent evidence was tainted. In announcing this rule the Court gave some indication of the allocation of the burden of proof. First, the accused must show that the evidence was illegally obtained. After this is done, the government must show that the evidence it wishes to introduce comes from a source independent of the illegally obtained evidence.

The government has aceded to this ruling and has recognized that once the accused has established that evidence was obtained illegally, the government has the ultimate burden of persuasion to show that evidence admitted at the trial is not a product of the illegally obtained

evidence. Alderman v. United States, 394 U.S. 165, 183.

Although this standard has been set, there is no case from this Court which deals with the quantum or the type of evidence necessary for the government to carry that burden. This case presents a fact situation where the Court should make that determination. It is important that this issue be decided not only for the instant case, but because it has potential effect on every case where it is established evidence was illegally obtained.

The facts of this case make it clear why the Court must clarify this issue. A month after the evidence was ruled inadmisable an anonymous letter was received by the Immigration Service identifying the petitioners and giving all the information necessary to conduct an investigation which would lead to the evidence of their deportability.

The Board of Immigration Appeals decided that this was sufficient evidence to remove the taint, as the letter, by itself, was enough to start an investigation that would have led to the information and that there was no evidence that the Service inspired the letter. This was the rationale accepted by the Court of Appeals.

The question is then clearly presented: Is any lead enough to remove the taint or does the government bear the burden of showing it had no connection to the lead or the lead has no connection to the prior illegal seizure. This is crucial, as the letter cannot be shown to be a product of the prior illegality but neither can it be shown to be free of it.

In another context, this Court has put a heavy burden upon the government to prove that evidence sought to be admitted is free from a prior illegal act. This is in the area of lineups, where counsel is not present. It is urged that

the problems of secrecy stressed in the lineup cases are equally pervasive in cases of investigative leads giving the same information as that previously illegally obtained.

In United States v. Wade, 388 U.S. 218, 240, the Court required clear and convincing evidence that the in-court identifications were not a product of illegal lineups. This was also follwed in Gilbert v. California, 288 U.S. 263, 272, where the Court required a record that allowed an informed judgment on the issue of whether the in-court identification was a product of the lineup.

Petitioners are aware that they bear the burden of proving the initial illegality of procedures to obtain evidence. However, once this has been done, it should be made clear that the government must produce probative and compelling evidence the taint has been removed if it seeks to introduce the same evidence as was

illegally seized. That evidence must be of such a character as to establish that it is free from the initial illegality, otherwise the important rights guarded by this Court and the Constitution can be erroded through anonymous informants who may be a product of the illegality or the agents' zeal to see that all possible evidence is admitted.

It was in part the difficulty of countering or accurately depicting what has happened at interrogations without counsel or lineups out of the presence of counsel, which had led to decisions such as Miranda v. Arizona, 384 U.S. 436, or United States v. Wade, supra. Secrecy makes it difficult, if not impossible, to protect constitutional guarantees. As was stated in Wade at page 230:

> [A]s is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identif-

> ication confrontations. 'Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . .' Miranda v. Arizona, supra at 448. For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial.

The evidence used to cleanse illegally obtained evidence must be capable of independent proof. Counsel must be able to inquire and to determine whether the lead is truly independent of the illegal acts of the government. While the evidence or tip need not rise to the level required for issuance of a search warrant, it must not be secret or anonymous and the government must introduce evidence that its source is independent. That does not exist here.

The use of secret informants was a practice whose abuse led to the inclusion in the Constitution of the requirements that search warrants could only issue on probable cause

and that a defendant must have the right to confront his accusers. These safeguards can only endure if the government is required to produce clear and convincing evidence that the source of the lead that cleanses the taint is truly independent. This requires evidence whose source is known and into which inquiry can be made. Any lesser requirement leaves too much freedom for abuse and the infringement of constitutionally protected rights.

In its decision, the Court of Appeals below has wrongfully decided a question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated above, it is respectfully submitted that an allowance to issue a Writ of Certiorari be granted to review the

decision of the court below.

Dated at San Francisco, California,
on June 17, 1974.

Respectfully submitted,

EDWARD L. CRAGEN
TIMOTHY H. POWER

By _____
EDWARD L. CRAGEN
Attorneys for Petitioners
Jose Jesus Perez-Lopez
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APPENDIX "A"

MEMORANDUM
IN REVIEW OF DECISION
OF UNITED STATES
IMMIGRATION & NATURALIZATION
SERVICE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE JESUS PEREZ-LOPEZ & EUGENIO PEREZ-LOPEZ,	)	
Petitioners,	)	No.
vs.	)	72-1667
IMMIGRATION AND NATURALIZATION SERVICE,	)	
Respondent.	)	

Petition to Review a Decision of the United States Immigration & Naturalization Service

Before: TRASK and WALLACE, Circuit Judges, and TAYLOR, District Judge*

MEMORANDUM

Jose and Eugenio Perez-Lopez petitioned us to review a deportation order of the Immigration & Naturalization Service (INS) as affirmed

*Honorable Fred M. Taylor, United States District Judge, Boise, Idaho, sitting by designation.

by the Board of Immigration Appeals. We affirm.

The first two assignments of error relate to the stopping of the petitioners and the questioning, detaining and subsequent searching of their room. We need not discuss those alleged errors because even assuming the evidence secured should not have been used in the hearing, the Board found that independently secured evidence was sufficient to order deportation.

The INS received an anonymous letter giving the address of petitioners and stating that they were Mexican national illegally in this country. An INS agent visited the abode and interviewed the petitioners' mother and Jose's wife who admitted that petitioners were born in Mexico and were Mexican citizens. These statements were introduced into evidence. Evidence from a prior hearing was then introduced, including copies of petitioners' I-94 documents which were secured

from Washington, D.C., INS Centeral Information Office. These documents showed that petitioners entered the United States as visitors.

Petitioners claim that this evidence is tainted by the initial episode with the INS. We disagree. The anonymous letter started a new investigation which, without any prior information, would have led to the incriminating evidence. See United States v. Nagelberg, 434 F.2d 585, 587 (2d Cir. 1970), cert. denied, 401 U.S. 939 (1971).

Petitioners claim that the INS learned from the mother and wife only that petitioners were aliens, i.e., Mexican citizens--not that they were illegally in the United States. But this alone, if believed, shifted the burden of proof to petitioners to prove the time, place and manner of their entry. Ah Chiu Pang v. Immigration & Naturalization Service, 368 F.2d 637 (3d Cir. 1966), cert. denied, 386 U.S. 1037 (1967).

Petitioners never met that burden.

Further, from the certification documents attached to the I-94 copies, it is bovious that the INS could have secured the documents after the interview with the mother and wife of Jose. That they did not do this idle act does not mean that any taint from the prior episode would travel with the documents. See United States v. Nagelberg, supra.

AFFIRMED.

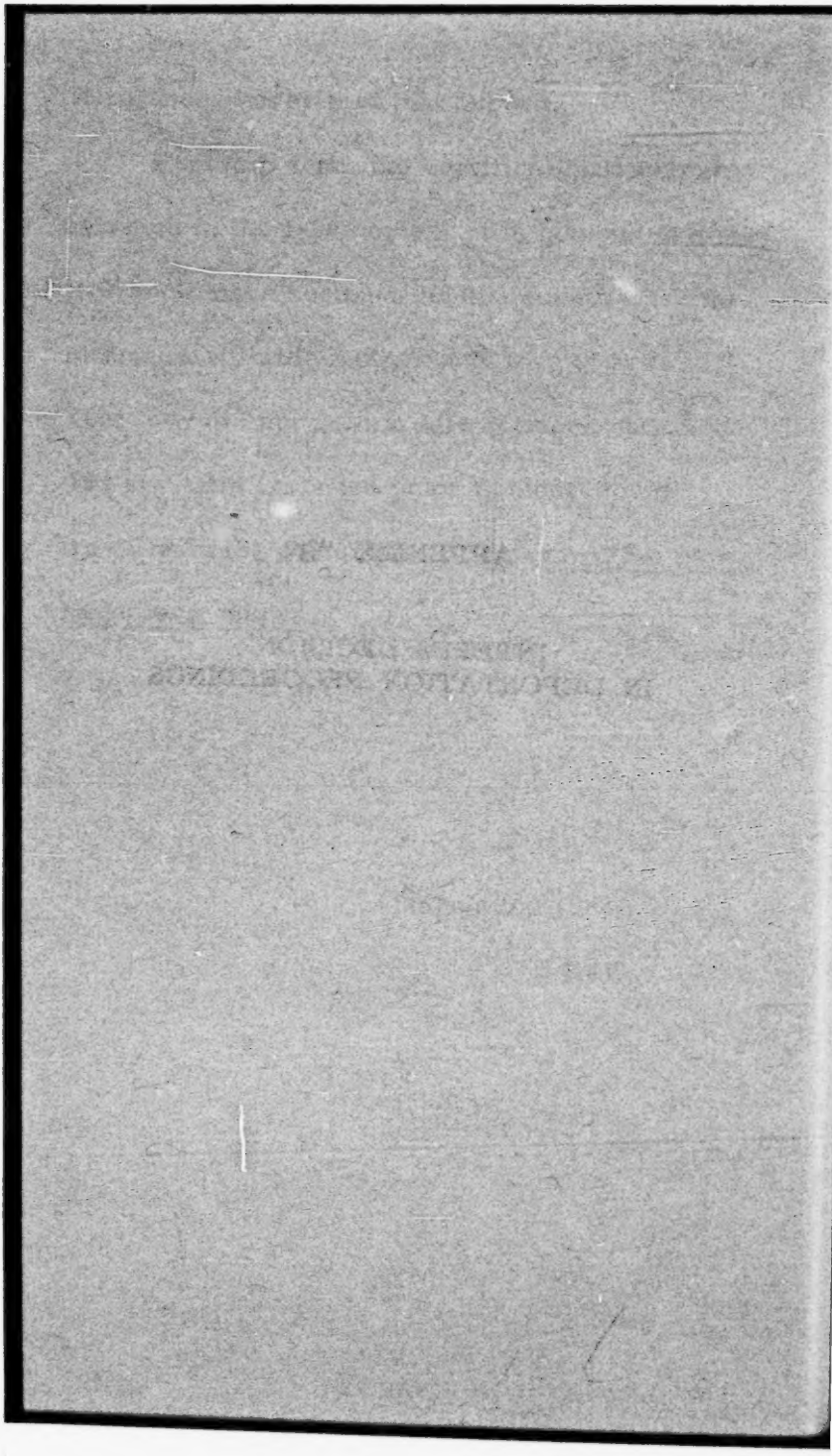
F I L E D

March 26, 1974

CLERK

APPENDIX "B"

INTERIM DECISION
IN DEPORTATION PROCEEDINGS



MATTER OF PEREZ-LOPEZ

In Deportation Proceedings

A-19171027
A-19171025

Decided by Board March 8, 1972

Interim Decision #2132

At a reopened hearing, the special inquiry officer ordered respondents deported. He certified this order to the Board. The issue is whether the evidence used against respondents is free of taint. We find it is and, therefore, will make no change in his order.

The special inquiry officer originally terminated deportation proceedings on the ground that the Service's case against respondents was based on evidence that was the "fruit of the poisonous tree." He found that a Service on-the-street questioning of respondents resulted in their legal arrest, that the Service subsequently

made an illegal search and seizure of documents in respondents' living quarters, that these documents were used as leads to obtain evidence from the Service andState Department files, and that this evidence was presented by the Service at the deportation hearing to establish that respondents were Mexican aliens who had entered for a temporary period and had remained without authority. The special inquiry officer concluded that this evidence was tainted and could not be used to establish deportability. The special inquiry officer also held that respondents' admissions against interest made after their arrest could not be used to establish deportability because the admissions were obtained after respondents' detention had become unlawful because of the Service's failure to follow its own regulations, 8 C.F.R. 287.3. The facts are stated in detail in the special inquiry officer's comprehensive order of March 8, 1971.

After the special inquiry officer terminated the proceedings, the Service received an anonymous letter stating that the respondents, who are brothers, are aliens illegally in the United States; that they had brought their mother and also the family of one respondent (wife and minor children) here; that they all lived at a certain address and that the respondents were working in the United States. The Service obtained a reopening of the deportation proceedings from the special inquiry officer. At the reopened hearing there was introduced in evidence the anonymous letter and statements taken by a Service investigator from the adult females named in the letter; the Service officer and the adult females testified. The special inquiry officer ruled that the Service had established its case by untainted evidence. He entered the order of deportation which is now before us. The special inquiry officer held that the letter would have led the Service to question

respondent's adult relatives named in the letter and that such examination would have ultimately put the Service in possession of the same evidence from its files and those of the State Department that it had tried to use against respondents at the original deportation proceedings. Such evidence, free of taint, supported an order of deportation.

Counsel concedes that the questioning of the mother and the wife named in the anonymous letter would have revealed that the respondents were illegally in the United States (counsel's brief, p. 2). However, he contends that since it was the anonymous letter that led the Service to these witnesses, the Service must show that the anonymous letter was itself clear of taint, and to do this, the Service must show that the writer of the anonymous letter (the informer) had made a factual statement and that his statement was based on personal knowledge. In short, counsel would apply here, the "probable cause"

test used in determining when an informer's statement may properly be the basis for the issuance of a search warrant, Aguilar v. Texas, 378 U.S. 108 (1964).

We must reject counsel's contention. The test as to the admissibility of evidence offered by the Government in a case where it has obtained evidence unlawfully is well settled. It is not the rule advanced by counsel. It is that the Government has the burden of establishing that it gained or could have gained the knowledge it relies upon from a source independent of its wrongful act, Wong Sun v. United States, 371 U.S. 471, 485 (1963). Applying this test and assuming arguendo, that the special inquiry officer's termination order was correct for the reasons he gave, we find that the anonymous letter was a lead independent of any taint, that it warranted Service inquiry and that the evidence which would have resulted from it would have established respondents'

deportability.

We must reject counsel's attempt to equate an anonymous letter to the Service which became the basis for an investigation, with an informer's tip to the police which became the basis for the issuance of a warrant in a criminal case. There is a material difference between considerations which justify a Service investigation based upon an anonymous letter and the considerations in criminal cases which require a showing of probable cause before a warrant may be issued on an informer's tip. The immigration laws specifically provide that an investigation may be undertaken without the issuance of a warrant (as long as there is no unconstitutional invasion of privacy), section 287(a)(1) of the Act, 8 U.S.C. 1357(a)(1). See section 235 of the Act, 8 U.S.C. 1225. An immigration investigation can be initiated without independent evidence of a violation of the immigration laws, United States v. Montez-

Hernandez, 291 F. Supp. 712 (E.D. Cal. 1968). See Laqui v. INS, 422 F.2d 807 (7 Cir. 1970). See also United States v. Minker, 350 U.S. 179 (1956).

There is nothing in this record which would indicate that the anonymous letter was inspired by the Service. We reject the notion that an alien illegally in the United States who is now found deportable on untainted evidence can achieve what is tantamount to permanent residence merely because the Service at one time may have acted illegally in assembling evidence of his deportability.

In view of the action we now take, it is unnecessary to discuss the special inquiry officer's order of March 8, 1971 terminating proceedings.

ORDER: No change is made in the special inquiry officer's order.